IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1870

WHIRLPOOL CORPORATION,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE; AND
BRIEF OF PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH), by its Counsel the Public Interest Law Center of Philadelphia, respectfully moves for leave to file the

attached brief amicus curiae in this case in support of the position of the respondent. The consent of the attorney for the respondent Ray Marshall, Secretary of Labor, has been obtained. The consent of the attorney for the petitioner Whirlpool Corporation was requested but refused.

PHILAPOSH is a non-profit corporation dedicated to improving occupational safety and health conditions. More than 50 local unions in the greater Philadelphia area, representing approximately 50,000 workers, are official sponsors of PHILAPOSH. (See attached list.)

The Supreme Court's determination of the validity or invalidity of the Secretary's regulation, which affords employees a protected right to refuse imminently dangerous work, will affect the lives of all these employees served by PHILAPOSH.

PHILAPOSH's experience in occupational safety and health activities on behalf of employees has given it a

perspective different from that of the Secretary of Labor or of an employer such as Whirlpool Corporation. Therefore, PHILAPOSH's views should be heard by this Court, particularly in light of the important role employees are asked to undertake in the enforcement of the Occupational Safety and Health Act. The effectiveness of the workers' role in enforcement will be significantly determined by the scope of the protection afforded to them by the decision in this case.

For the foregoing reasons, PHILAPOSH requests this Court grant it leave to file a brief amicus curiae.

PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA

By /s/Michael Churchill
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Philadelphia Area Project on
Occupational Safety and Health

List of Trade Union Sponsors

Local No.	Company, Location	Union Members
United Steelworkers of America		
13939	Ionac Chemical, Birmingham, NJ	100
12238	Ionac Chemical, Birmingham, NJ	20
7207	Lenape Forge, Kennett Sq., PA	150
United Auto Workers		
918	Ford Motor, Pennsauken, NJ	200
1612	ITE-Gould, Phila., PA	2500
834	Kelsey-Hayes, Phila, PA	1000
1695	Ford Aerospace, Lansdale, PA	600
929	Ametek Schutte and Koerting Division, Cornwall Hts., PA	250
131	White Motors, Autocar Division, Exton, PA	400
2068	Trailmobile, W. Point, PA	600
1350	Leeds and Northrup, N.Wales, PA	100
Oil, Chemical and Atomic Workers International Union		
8-831	Mobil Oil, Paulsboro, NJ	1200
8-234	British Petroleum, Marcus Hook, PA	400
8-890	Tenneco, Burlington, NJ	200
8-743	Crown-Zellerbach New Castle, DE	150
8-667	Allied Chemical Phila., PA	200
8-760	3M Company Freehold, NJ	600
8-930	Sun Olin, Claymont, DE	100
8-638	Texaco, Westville, NJ	600
8-732	Amoco Chemicals, New Castle, DE	200
8-898	Getty Oil, Delaware City, DE	350
8-878	Kohnstamm Co., Camden, NJ	50
8-5570	Carter-Wallace Co., Cranbury, NJ	800
United Paper Workers		
375	Amalgamated Local, Phila., PA	1600
714	Scott Paper, Eddystone, PA	200
333	Amalgamated local, Phila., PA	600
68	Container Corp., Phila., PA	250

United Glass and Ceramic Workers

514	C § E Glass, Pennsauken, NJ	250
88	Rohm & Haas, Bristol, PA	600
482	Hooker Chemical, Burlington, NJ	300

International Union of Electrical Workers

111	Westinghouse, Phila., PA	100
140	Struthers-Dunn, Pitman, NJ	100

International Chemical Workers

619	Kawecki-Berylco, Boyertown, PA	250
959	Kawecki-Berylco, Boyertown, PA	40

United Rubber Workers

785	Lee Tire, Conshohocken, PA	600
367	Stauffer Chemical, Bordentown, NJ	125

United Electrical Workers

155	Amalgamated Local, Phila., PA	

Distributive Workers of America, District 65

95	Amalgamated Local, Vineland, NJ	800

National Union of Hospital and Health Care Employees

1199C	Amalgamated District, Phila., PA	8000

American Federation of State, County, and Municipal Employees

1723	Temple University, Phila., PA	200

United Textile Workers

2409	Nicolet, Ambler, PA	180

International Brotherhood of Electrical Workers

529	Electricians, Vineland, NJ	400

Service Employees International Union

668	State of Pennsylvania, Phila., PA	1200

Pennsylvania Federation of Telephone Workers

	Philadelphia Chapter, Bell Telephone, Phila., PA	4000

Chemical Workers Association, Independent

	DuPont, Salem, NJ	4500

Chemical and Industrial Workers Union, Independent

	DuPont, Gibbstown, NJ	200

Amalgamated Clothing and Textile Workers

	Philadelphia Joint Board	6000

Negro Trade Union Leadership Council 1000

Oil, Chemical, and Atomic Workers International Union 8-719
Exxon Chemical,
Pottsville, PA 200

Independent Union of Delaware Valley Chemical Workers
Hercules,
Gibbstown, NJ 80

Communications Workers of America Local 1084
Camden County Welfare Board,
Camden, NJ 250

American Federation of State, County and Municipal Employees Local 2187
City of Philadelphia,
Phila., PA 1200

USWA Local 2322
Phoenix Steel,
Phoenixville, PA 500

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BRIEF OF PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

INTEREST OF AMICUS

PHILAPOSH is a non-profit corporation dedicated to improving occupational safety and health conditions.

More than 50 local unions in the greater Philadelphia area, representing approximately 50,000 workers, are official sponsors of PHILAPOSH.

The Supreme Court's determination of the validity or invalidity of the Secretary's regulation, which affords employees a protected right to refuse imminently dangerous work, will vitally affect the lives of these employees. PHILAPOSH's experience in occupational safety and health activities strongly indicates that any diminution in the extent of employee protection provided under the Act will have a chilling effect on the ability of these workers to participate in the enforcement program designed by Congress.

QUESTION PRESENTED

WHETHER THE SECRETARY OF LABOR EXCEEDED HIS AUTHORITY IN PROMULGATING A REGULATION WHICH PROHIBITS EMPLOYERS FROM RETALIATING AGAINST EMPLOYEES FOR REFUSING TO WORK UNDER CONDITIONS WHICH THREATEN SERIOUS INJURY OR DEATH.

STATUTE AND REGULATION INVOLVED

Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §660(c)(1):

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act. (Emphasis added.)

29 C.F.R. §1977.12(b)(2)(1979):

> However, occasions might arise when an employee is confronted with a choice between not not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that

a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

STATEMENT OF THE CASE

This amicus curiae brief is limited to the issue of whether the Secretary of Labor exceeded his authority in promulgating a regulation prohibiting employers from retaliating against employees for refusing to work under conditions which threaten serious injury or death. For this reason, the brief relies on facts as found by the trial court in Usery v. Whirlpool Corp., 416 F.Supp. 30, 32 (N.D. Ohio 1976), and as affirmed sub nom. Marshall v. Whirlpool Corp., 593 F.2d 715, 719 (6th Cir. 1979):

1. On June 28, 1974, Mr. George Cowgill, a Whirlpool maintenance

employee, fell a distance of twenty feet through an overhead guard screen, where he had been assigned to work. Hours after this incident, Mr. Cowgill died as a result of the fall. Usery v. Whirlpool Corp., 416 F.Supp. at 32.

2. On July 10, 1974, Whirlpool assigned two maintenance employees, Mr. Deemer and Mr. Cornwell, to perform similar work on similar overhead guard screens. They refused to undertake the assignment stating that they believed the guard screens were unsafe. Id. at 32.

3. The trial court found that the work assignment which Mr. Deemer and Mr. Cornwell refused to undertake "did present a danger of death or serious bodily harm." Id. at 32.

4. In retaliation for their refusal to undertake the dangerous assignment, Whirlpool issued written reprimands to Mr. Deemer and Mr. Cornwell and sent them home, causing each of them to lose six hours of pay. Id. at 32.

SUMMARY OF ARGUMENT

The Occupational Safety and Health Act was adopted by Congress in order "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." To fulfill this goal, Congress developed an enforcement mechanism which requires the active cooperation of employees. In concert with previous remedial labor legislation dependent on employee involvement, Congress enacted an anti-retaliation provision which prohibits employers from retaliating against employees for exercising "any right afforded by this Act." 29 U.S.C. §660(c)(1).

Traditionally, courts have liberally construed anti-retaliation provisions so as to include within their penumbra rights explicitly provided and rights found to be implicit in the statutes. Though not expressly provided in the Act, the purpose of the Act and the effective enforcement of the employer's duty under §5(a)(1) to

provide a workplace free from hazards "causing or likely to cause death or serious physical harm," demand that a right to refuse imminently dangerous work be implied. In promulgating regulation 29 C.F.R. §1977.12(b)(2), the Secretary has authoritatively recognized such a right, and, in doing so, it cannot be said that he was unreasonable.

The legislative history with respect to the right to refuse imminently dangerous work is not definitive. The Congress never confronted the issue directly. That Congress rejected a proposal which would have provided a right to refuse some types of work with pay cannot be interpreted as meaning that Congress considered and rejected a provision, such as the Secretary's, which affords workers a right to refuse work without pay. Nor can Congressional rejection of proposals to authorize OSHA officials to halt, without judicial sanction, imminently dangerous work be interpreted

to mean that Congress opposed the right of individual workers to personally refrain from such activity.

The Secretary's regulation cannot be dismissed as unreasonable and accordingly must be upheld.

ARGUMENT

Preface

We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies still intact. We are talking about assuring our American workers who wok [sic] with deadly chemicals that when they have accumulated a few years seniority they will not have accumulated lung congestion and poisons in their bodies, or something that will strike them down before they reach retirement age. Legis. Hist. at 510 (Senator Yarborough).1/

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1. The legislative history of the Act is found in Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print, June 1971) (hereinafter "Legis. Hist.").

I. THE OCCUPATIONAL SAFETY AND HEALTH ACT IS REMEDIAL LEGISLATION REQUIRING EMPLOYEE COOPERATION FOR MEANINGFUL ENFORCEMENT.

A. Purpose of the Act

The Occupational Safety and Health Act of 1970 (hereinafter the "Act"), 29 U.S.C. §651 et seq., was intended by Congress to be remedial legislation. Congress declared that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses and disability compensation payments." 29 U.S.C. §651. The magnitude of the problem which the Act was designed to remedy was expressed by Senator Javits:

> The bill herewith is the most important piece of legislation affecting American workers to be considered by Congress in many years. Each year 14,000 Americans are killed at work, more than 2,000,000 suffer disabling injuries, and uncounted thousands fall victims to occupational diseases such as

> silicosis, asbestosis, bysinosis, pesticide and chemical poisoning, lung and bladder cancer, and other horrible byproducts of our industrial progress.

Legis. Hist. at 193.

To end this workplace carnage, Congress declared that its purpose and policy in the Act were "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. §651(b). This language is not mere hyperbole. "It is manifest throughout the [Act], that the purpose of the Act is to protect the health and safety of workers...." Brennan v. Occupational Safety and Health Review Commission, 488 F.2d 337, 338 (5th Cir. 1973). Section 5(a)(1), 29 U.S.C. §654(a)(1), commonly called the general duty clause, places on each employer the duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are

likely to cause death or serious physical harm to his employees." In §6(b)(5), 29 U.S.C. §655(b)(5), Congress directed the Secretary to set standards for toxic substances "which most adequately assure[s], to the extent feasible...that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard... for the period of his working life." (Emphasis added.) The overriding concern of OSHA, therefore, is the protection of the health of American workers. Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974).

B. Employee Role in Enforcement of the Act.

To effectuate its purpose, Congress generally encouraged employer-employee cooperation for workplace health and safety, 29 U.S.C. §§651(b)(1) and (4), but also proposed "separate but dependent responsibilities and rights" for employers and employees, 29 U.S.C. §651(b)(2). More

specifically, the Act seeks to encourage direct employee involvement in the enforcement of the Act and in the development of health and safety standards and regulations. Thus an employee is afforded the opportunity: to request an OSHA inspection of his workplace when he suspects a violation or when he suspects an imminently dangerous condition exists, 29 U.S.C. §657(f)(1); to have his representative participate in OSHA inspections of his workplace, 29 U.S.C. §657(e); to communicate with the OSHA inspector during the inspection of his workplace, 29 U.S.C. §657(f)(2); to be informed of any OSHA citations and proposed abatement schedules for correcting violations, 29 U.S.C. §658(b); to contest the proposed abatement schedule, 29 U.S.C. §659(c); to seek a mandamus order in a federal district court to require the Secretary of Labor to seek an injunction against his employer when imminently dangerous situations are found to be present in the workplace,

29 U.S.C. §662(d); to participate in the Act's rulemaking process, 29 U.S.C. §655(b)(2); to oppose his employer's requests for variances from applicable rules, 29 U.S.C. §§655(b)(6) and (d); and to challenge promulgated standards, 29 U.S.C. §655(f).

By providing employees with these enforcement rights, Congress gave clear evidence that it intended workers to have a dynamic role in the continuous process of securing and maintaining safe and healthful workplaces. The enforcement rights further indicate Congressional recognition of the realities of employer-employee relations; i.e., that an employer is much more likely to conform to governmental health and safety standards if his employees are endowed with meaningful oversight powers.

Congress also recognized that Occupational Safety and Health Administration (hereinafter "OSHA") inspectors alone cannot adequately police the millions of workplaces covered by the

Act. See Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 483-4 (D.C. Cir. 1974). Congressional hearings in 1970 revealed that "both Federal and State safety and health inspectors [were] severely inadequate in number." Legis. Hist. at 1032 (Congressman Dent). Congressman Dent's observations are still applicable. In fiscal 1976, there were over four million private sector workplaces employing over sixty million workers covered by the Act.2/ There were some 58,000 worksite inspections by OSHA, and states with approved plans made

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2. "1976 County Business Patterns," Department of Commerce, Bureau of Census, CBP 76-1 (August, 1978)

an additional 140,000 inspections.3/ These statistics reveal that, on the average, each workplace in the nation can expect a government safety and health inspection once every twenty years. It is apparent, therefore, that if employees are to have workplaces free from hazards causing or likely to cause death or serious physical injury, their active participation in the OSHA enforcement scheme is essential.

C. The Act's Anti-Retaliation Provision

The anti-retaliation provision of the Act, 11(c)(1), 29 U.S.C. §660(c)(1), reads as follows:

> No person shall discharge or in any manner discriminate against

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3. Report to the Congress of the United States, "How Can Workplace Injuries Be Prevented? The Answers May Be In OSHA Files", U.S. General Accounting Office, HRD-79-43 at 2 (May 3, 1979).

> any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act. (Emphasis added.)

Provisions similar to §11(c)(1) have traditionally been included in remedial labor legislation.4/ Commenting on the necessity for a similar provision in the Fair Labor Standards Act

4. Such provisions appear in the National Labor Relations Act, 29 U.S.C. §158 (a)(4); the Fair Labor Standards Act, 29 U.S.C. §215(a)(3); the Federal Mine Safety and Health Act; 30 U.S.C. §815(c)(1); Title VII of the Civil Rights Act, 42 U.S.C. §2000e-3; and the Longshoremen's and Harbors Workers' Act, 33 U.S.C. §948(a).

(hereinafter "FLSA"), 29 U.S.C. §215(a)(3),5/ Mr. Justice Harlan observed:

> "[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

Worker protection clauses, such as §11(c)(1), have traditionally been construed in accordance with the rule

5. F.L.S.A., 29 U.S.C. §215(3)(a):

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--
>
> * * * *
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or has or is about to serve on an industry committee.

that statutes intended to protect workers should be given a liberal construction. Lilly v. Grand Trunk Western R. Co., 317 U.S. 481, 486 (1943); NLRB v. Scrivener, 405 U.S. 117, 124 (1972). Moreover, such provisions "must be read in the light of the mischief to be corrected and the end to be attained."(Citations omitted). Dunlop v. Carriage Carpet Co., 548 F.2d 139, 145 (6th Cir. 1977).

Illustrative of these principles is the construction given to the anti-retaliation provision of the Coal Mine

Health and Safety Act 6/ with respect to the discharge of a miner for refusing to work under hazardous conditions in the case of Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), cert. denied sub nom. Kentucky Carbon Corp.

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6. The anti-retaliation provision of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. §820(b)(1):

(b)(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

v. Interior Board of Miner Operations Appeals, 400 U.S. 938 (1975). The statute, which was the forerunner of the Occupational Safety and Health Act, had no express provision affording miners the right to refuse work under hazardous conditions and no regulation to that effect had been promulgated. Nevertheless, the court interpreted the work refusal to be the first step in a process of filing a safety complaint with the employer under an employer-employee agreement; the complaint to the employer was also a step in the process of making a complaint to the Mine Safety Board which administered the Act, and therefore the discharge was ruled to be a discharge for the worker's attempt to file a complaint with the Mine Safety Board. Accordingly, the court held that the employer had violated the statute's anti-retaliation provision. See also Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974), aff'd sub nom. Munsey v. Federal Mine

Safety & Health Review Commission, 595 F.2d 735 (1978). In commenting on Phillips, the Sixth Circuit in the case below remarked that even in the absence of an employer-employee agreement "[t]here is no reason to accord lesser protection to employees of companies without such formal procedures." Marshall v. Whirlpool Corp., 593 F.2d 715, 725 n. 18 (1979).

In 1977, when Congress amended the Coal Mine Health and Safety Act, it also amended the anti-retaliation

provision, 30 U.S.C. §815(c)(1),7/ and

7. The amended anti-retaliation provision, appearing in the Federal Mine Safety and Health Act, 30 U.S.C. §815 (c)(1):

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential

(footnote cont.)

the accompanying Senate Report explicitly endorsed the Phillips and Munsey decisions. Sen. Rep. 95-181, 95th Cong., 1st Sess. (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 3401. More specifically, the Senate Report endorsed the right of miners to refuse hazardous work.

> This section is intended to give miners, their representatives, and applicants, the right to refuse work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

Id. at 3436.

(footnote cont.)

> transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or, has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

The liberal construction which the Phillips court gave to the anti-retaliation provision in the Coal Mine Health and Safety Act is clearly in the tradition of previous court interpretations of such provisions. Fifteen years earlier, the Supreme Court was called upon to construe the anti-retaliation provision of FLSA in Mitchell v. Robert DeMario Jewelry,Inc.,361 U.S. 288 (1960). That anti-retaliation provision, 29 U.S.C. §215(a)(3),8/ prohibited employers from retaliating against employees for instituting complaints regarding substandard wages, but the statute did not expressly provide for employers to reimburse employees for wages lost due to the unlawful employer retaliation. Recognizing that few workers would avail themselves of the statutory right to complain about substandard wages if by such action they ran the risk of losing all their wages, this Court found an implied right in the FLSA which entitled

8. See footnote 5, supra.

employees to be reimbursed. Said the Court: "[W]e cannot read the [FLSA] as presenting those it sought to protect with what is little more than a Hobson's choice." Id. at 293.

Recently, in Chamber of Commerce v. OSHA, 465 F.Supp. 10 (D.D.C. 1978), appeal docketed, No. 79-2302 (D.C. Cir. October 29, 1979), the district court was required to construe the employee protection provision of the Occupational Safety and Health Act, §11(c)(1), 29 U.S.C. §660(c)(1), in relation to the so-called walkaround provision of the Act, §8(e), 29 U.S.C. §657(e).9/ The

9. Section 8(e), 29 U.S.C. §657(e):

> (e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or

(footnote continued)

walkaround provision affords employees a right to have a representative participate in OSHA workplace inspections. The provision and the statute, however, are silent regarding the responsibility of employers to compensate the representative (employee) for time spent on the walkaround. In 1973, the Secretary had issued a regulation declaring that it was "not per se discriminatory" for an employer to refuse to pay for walkaround

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(footnote cont.)

his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

time. 29 C.F.R. §1977.21 (1973).10/ In 1977, however, the Secretary issued a revised regulation which makes the withholding of pay for walkaround time a violation of §11(c)(1). 29 C.F.R. 1977.21

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10. The regulation on walkaround pay as promulgated in 1973, 29 CFR §1977.21(1973), in relevant part reads as follows:

> (a) Complaints involving claims of discrimination based upon employer failure to pay employees who participate in section 8(e) federal walkaround inspections of a workplace will require close scrutiny of the facts in each instance. However, as a general rule, such refusal to compensate for time so spent is not per se discriminatory....

Leone v. Mobil Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975), held that neither F.L.S.A., 29 U.S.C. §201 et seq., nor the Occupational Safety and Health Act required employers to compensate employees for walkaround time.

(1979). 11/ In issuing the revised

11. The regulation on walkaround pay as revised in 1977, 29 C.F.R.§1977.21 (1979), reads as follows:

§1977.21 Walkaround pay disputes.

The Secretary recognizes the essential nature of employee participation in walkaround inspections under section 8(e) of the Act. Employees constitute a vital source of information to representatives of the Secretary concerning the presence of workplace hazards. Employees should be able to freely exercise their statutory right to participate in walkarounds without fear of economic loss, such as the denial of pay for the time spent assisting OSHA compliance personnel during workplace inspections. Therefore, in order to insure the unimpeded flow of information to the Secretary's inspectors, as well as the unfettered statutory right of employees to participate in walkaround inspections, an employer's failure to pay employees for time during which they are engaged in

(footnote continued)

regulation, the Secretary noted that experience in administering the OSHA program had shown that "employee participation and cooperation at the inspection stage [had] proved to be critically important to enforcement efforts under the Act," 42 Fed. Reg. 47344(1977), and that "loss of pay involved [in a walkaround] would clearly constitute a disincentive to employees exercising their express statutory right under §8(e) to accompany a compliance officer during an inspection." Id., 47344-45. Based on this experience, the court held that the revised regulation was valid. Said the court:

(footnote cont.)

walkaround inspections, is discriminatory under section 11(c). In addition, where employees participate in other inspection related activities, such as responding to questions of compliance officers, or participating in the opening and closing conferences, an employer's failure to pay employees for time engaged in these activities is discriminatory under section 11(c).

> The Secretary's ruling is in no way inconsistent with the Occupational Safety and Health Act or any other expression of Congressional policy. To the contrary, requiring walkaround pay is plainly adapted to the effectuation of employee participation rights afforded by section 657(e). (Footnotes omitted.)

Chamber of Commerce, 465 F.Supp. at 13.

In so holding, the district court was following the rule of applying liberal construction to remedial statutes; and more particularly it was following the precedent established in Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

Section 11(c)(1) is broadly drawn; it expressly protects employees in the exercise of "any right afforded by the Act." It indicates a Congressional intent to provide employees with comprehensive protection in order to encourage their cooperation with the Act's enforcement program. See Chamber of Commerce, supra. Nevertheless, Whirlpool would have this Court construe §11(c)(1) so narrowly that a right which is implicit in the Act would remain

unprotected. Petitioner's Brief (hereinafter "Pet. Br."), 18, 19, 34. To construe remedial legislation so narrowly would represent a sharp departure from judicial tradition. To construe §11(c)(1) so narrowly would deny employees a protected right to refuse imminently dangerous work. To construe §11(c)(1) so narrowly would mean that while employees covered by the Coal Mine Safety and Health Act have a protected right to refuse imminently dangerous work, the employees covered by the Occupational Safety and Health Act would have "what is little more than a Hobson's choice." Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 293 (1960).

II. THE SECRETARY'S REGULATION IS REASONABLY RELATED TO THE ACT

Preventing tragedies such as befell George Cowgill at Whirlpool and as befell thousands of workers each year, rather than payment of death benefits and workers' compensation, is the raison d'etre of the Act. Given that legislative purpose, Cowgill should have had a

protected right to refuse to continue his work assignment and to remove himself to safer quarters before the tragedy occurred. Without such a protected right, many workers under economic pressure will continue to work at imminently dangerous tasks, and many more tragedies, inevitably, will result. Nonetheless, the petitioner contends, in effect, that if Cowgill had removed himself from the unsafe overhead guard screens before the tragedy, the Whirlpool Corporation would have been within its legal rights to retaliate against him for his life-preserving conduct by firing him or by any other economic sanction. It is impossible to believe that in adopting the Occupational Safety and Health Act, Congress consciously intended to create such an anomaly.

The Secretary, fortunately, has rejected this draconian view, and he has reasonably construed the Act to provide employees with an implied right to refuse work under certain conditions. Those conditions are delineated in

regulation 29 C.F.R. §1977.12(b)(2) (1979), promulgated in 1973, which provides:

> However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or a serious injury, and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

The regulation is carefully drawn and considerably circumscribed. Under

the regulation, the right to refuse work arises only if:

(1) the employee seeks corrective action from his employer, where possible; and,

(2) the employer fails to make the correction; and,

(3) there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to OSHA's regular enforcement machinery; and,

(4) there is a real danger of death or serious injury as judged under the objective, reasonable man test; and,

(5) the employee's refusal to continue his work assignment is made in good faith.

Under the regulation, the right to refuse work is limited to situations where there is a "real danger of death or serious injury." In establishing this criterion, the Secretary has tracked the statutory language of §5(a)(1), which imposes a duty on an employer to provide "employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm

to his employees." 29 U.S.C. §654(a)(1). The regulation also tracks the language of §17(k), which differentiates serious health and safety violations from non-serious ones: "A serious violation shall be deemed to exist... if there is a substantial probability that death or serious physical harm could result from a condition which exists." 29 U.S.C. §666(j). Thus, the regulation affords employees a right to refuse work only in situations where there is a serious violation and the employer is in violation of his duty under the Act. Though these are necessary conditions, they are not sufficient to establish the right to refuse work. The right arises only after all the other conditions are fulfilled. In effect, the right arises only in situations where no one else can or no one else will protect the employees health, safety or life.

Considering the many "legal" conditions which must be satisfied before the right to refuse work arises, a worker is not very likely to cease working in reliance on the regulation's

protection except in the most serious situations. Even then, unfortunately, he may find that when his action in the face of impending tragedy is evaluated months or years later, an administrative or judicial panel may find that it does not measure up to the legal requirements of the regulation. See Usery v. Alan Wood Steel Co., 40 OSHC 1598 (BNA, E.D. Pa. 1976). Even so, the limited right to refuse work afforded by the regulation is better than no right at all.

Contrary to the assertions of Whirlpool (Pet. Br. at 18), the regulation does not require an employer to compensate an employee during the period when he is exercising his right to refuse work if no alternative work is available or if he refuses to perform that alternative work. Conversely, the regulation prohibits the employer from discriminating against the worker, and, consequently, the employer violates

§11(c)(1) if he refuses to offer the employee alternative work if such work is available. Consequently, Whirlpool unlawfully retaliated against employees Deemer and Cornwell when it refused to offer them available alternative work and thereby caused them to lose wage income for exercising their right to refuse imminently dangerous work.

Further, contrary to the contention of Whirlpool (Pet. Br. at 35), the regulation does not provide employees with a right to "shut down" an employer's operations. The regulation merely gives employees the right to personally refuse certain work; the employer may continue the operation with other employees if they are willing to undertake the hazardous assignment.

The statutory purpose of the Act leaves no doubt that unless workers have a right to refuse imminently dangerous work, the Act's remedial purpose would be severely frustrated. The Secretary has construed the Act to imply a right to refuse work under the limited

conditions of the regulation. The Secretary's determination is reasonably related to the purposes of the Act and therefore is entitled to great weight. Mourning v. Family Publications Services, Inc., 411 U.S. 356, 369 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 433-4 (1971). In order to sustain the regulation, the Court "need not find that its construction is the only reasonable one, or even that it is the result [the Court] would have reached had the question arisen in the first instance in judicial proceedings." (Citations omitted.) Udall v. Tallman, 380 U.S. 1, 16 (1965); see also Brennan v. Southern Contractors Service, 492 F.2d 498, 501 (5th Cir. 1974).

III. THE SECRETARY'S REGULATION IS NOT INCONSISTENT WITH THE INTENT OF CONGRESS AS REFLECTED IN THE LEGISLATIVE HISTORY

A. Ambiguity of the Legislative History

The purpose and structure of the Act logically demand that the right to refuse imminently dangerous work be

implied. Recognizing that the Act contains no express exclusion of such a right (Pet. Br. at 17), Whirlpool bases its refutation of the regulation on the Act's legislative history. (Pet. Br., 21 et seq.). Numerous courts have examined this history, and they are sharply divided.

In Marshall v. Daniel Construction Co., Inc., 563 F.2d 707 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978), a divided court held that the legislative history indicated that Congress did intend to deny workers the right to refuse work; but in dissent, Judge Wisdom concluded that, "Congress felt that workers could live with the prescribed processes of this Act. I cannot believe that it required workers to die for them." Id. at 722.

The majority view in Daniel is supported by the Tenth Circuit in Marshall v. Certified Welding Corp., 7 OSHC 1069 (BNA, 10th Cir. 1978). More recently, in the case below, Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3188 (October 2, 1979),

a unanimous court rejected the majority view in Daniel, and added:

> [W]e find ourselves in full agreement with Judge John Minor Wisdom's dissent in that case and with his conclusion that the same Congress which wanted employees to work in safe and healthful surroundings could not have meant for them to die at their posts. A worker should not have to choose between his job and his life without the reasonable safeguard provided by this regulation.

Marshall v. Whirlpool Corp., 593 F.2d at 736.

In those areas where circuit courts have not yet rendered decisions in cases under regulation 29 C.F.R. §1977.12(b)(2) (1979), three district courts have upheld the validity of the regulation. Marshall v. Halliburton Services, Inc., 7 OSHC 1161 (BNA, N.D. W.Va. 1979); Marshall v. Seaward Construction Co., Inc., 7 OSHC 1244 (BNA, D.N.H. 1979); and Usery v. Babcock and Wilcox Co., 424 F.Supp. 753 (E.D. Mich. 1976), in which the court said:

> [T]his Court concludes that at worst [the legislative history] is ambiguous, at best consistent with the Secretary's interpretation in Rule 1977.12(b)(2)...The Secretary's interpretation of the Act in the light of the legislative history cannot be dismissed as an unreasonable interpretation and accordingly it must stand.

Id. at 757.

This brief amicus curiae will not make a detailed analysis of the lengthy legislative history of the Act but will attempt merely to highlight some aspects of the history for the Court's consideration.

B. The So-Called Strike-With-Pay Proposal

To a great extent, Whirlpool's contention that the work refusal regulation is invalid is based on the fact that the House of Representatives did not support the so-called "strike-with-pay" proposal of Congressman Daniels. (Pet. Br.,25 et seq.). The Daniels provision required that employees be paid for doing no work in certain limited circumstances. In contrast, to the Daniels proposal, the Secretary's regulation does not require that employees

be paid when they are not working. "Read in the context of the entire debate, it is apparent that Congress' voiced concern was aimed specifically against strike with pay. No mention was made of worker's [sic] right to absent themselves from a dangerous work situation without pay." Usery v. Babcock and Wilcox Co., 424 F.Supp. 753, 756 (E.D. Mich. 1976).

Petitioner denies this contention on the basis of a single statement in the legislative history. In its Brief at 26, Whirlpool refers to a statement by Congressman Steiger of Wisconsin: "Let me emphasize again, there is nothing in our bill which authorizes strikes without pay." (Emphasis added.) The next sentence reads, "Nevertheless, if the committee bill prevails, we are going to clarify that language with an amendment." Legis. Hist. at 1075.

Since it was the committee bill which contained a strike-with-pay proposal that was going to be amended (Legis. Hist. at 986), it is evident that the reference to strike-without-pay was made in error. Nowhere else in the legislative history is there any reference to a strike-without-pay proposal.

C. The Power to Enjoin Imminently Dangerous Conditions

A second basis for Whirlpool's contention that the Secretary's regulation is invalid is the legislative history relevant to adoption of §13 of the Act, 29 U.S.C. §662. Section 13 grants federal district courts jurisdiction to enjoin workplace conditions where "a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated though the enforcement procedures otherwise provided by this Act." 29 U.S.C. §662(a). The Congressional controversy leading to the adoption of the provision concerned the

question of whether the Secretary (or his representative or an OSHA compliance inspector) should be empowered to order an operation or plant shutdown where an imminently dangerous condition was found to exist by an OSHA inspector. Concerned about the question of due process and overstepping by non-judicial government agents (Legis. Hist.,442,447-8,451-60,500,508,877,1009-10), Congress finally placed all injunctive power in the control of the courts. The refusal of Congress to grant any OSHA official the power to shut down a plant operation, even for a limited period of time, is interpreted by Whirlpoool (Pet. Br. at 32) to preclude a regulation which would give an employee such a protected right. Whirlpool, however, overstates the case, because the Secretary's regulation does not give an employee such a right. See Section II, supra. The right afforded to an employee is merely the right to personally absent himself from the hazardous work; the employer is not prohibited, except by conscience, from continuing his operation with other workers. "There is a vast amount of difference

between shutting down an entire plant and allowing a few employees to refuse a particular work assignment." Usery v. Babcock and Wilcox Co., 424 F.Supp. 753, 757 (E.D. Mich. 1976).

D. The Right to Request Inspections

The petitioner (Pet. Br. at 34) contends that by granting employees the right to request OSHA inspections of imminently dangerous conditions, 29 U.S.C. §657(f)(1); and granting the Secretary the right to petition a court for an injunction to enjoin such conditions, 29 U.S.C. §662(a); and granting federal district courts jurisdiction to issue such injunctions, 29 U.S.C. §662 (b), the Congress provided an exclusive scheme for dealing with hazardous conditions which forecloses an implied right to refuse work. Though the scheme may be applicable to most workplace situations, a moment's reflection will reveal its impracticality in other cases.

According to Whirlpool, the only procedure available to maintenance men

Deemer and Cornwell, when they did not want to comply with the order to undertake the imminently dangerous work on the overhead screens, was the procedure expressly indicated in the Act. Under that procedure, Deemer and Cornwell presumably could leave their posts to contact OSHA (though this is not explicit in the Act) to request an "imminent danger" inspection; but after making such contact they would have to undertake the imminently dangerous assignment awaiting government action. Based on considerations of workload and OSHA evaluation of the information received from Deemer and Cornwell, OSHA would schedule a worksite inspection. When the OSHA inspector eventually arrived, Whirlpool could exercise its Fourth Amendment right to deny entry to the inspector, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). The inspector would return to his office, fill out a report and start the procedure to obtain a search warrant in district court. Finally, armed with the warrant, OSHA would undertake its

inspection; but the inspection could not bring relief to Deemer and Cornwell because OSHA officials are not empowered to enjoin imminently dangerous working conditions. The inspector once more would go back to the office, fill out a report and start the procedure for a court injunction. While Deemer and Cornwell continued on their precarious perch, Whirlpool would be exercising its Fifth Amendment right to oppose the injunction. At last, days, weeks, or months later, an injunction would be issued which would allow Deemer and Cornwell to get down from the screen without fear of economic reprisal. By that time, tragedy may very well have occurred.

Congress could not have intended to prescribe such an exclusive procedure for imminently dangerous situations such as confronted Deemer and Cornwell. To avoid frustrating the purpose of the Act, Congress authorized the Secretary to promulgate regulations to effectuate the Act, 29 U.S.C. §657(g)(2), as experience revealed the necessity.

Chamber of Commerce v. OSHA, 465 F.Supp. 10 (D.D.C. 1978), appeal docketed, No. 79-2302 (D.C. Cir. October 29, 1979). The Secretary's regulation in respect to imminent danger situations is fully consonant with that Congressional intent.

IV. THE REGULATION REFLECTS, RATHER THAN CREATES, NEW LABOR POLICY.

Finally, Whirlpool argues that the Secretary's regulation reflects "a monumental change in prevailing labor policy" because it affords employees who refuse to work under imminently dangerous conditions "absolute immunity" in respect to pay or discipline. (Pet. Br. at 19). In contrast, argues the petitioner, neither §7 of the National Labor Relations Act, 29 U.S.C. §157, nor §502 of the Labor-Management Relations Act, 29 U.S.C. §143, have ever been "construed to create a right to refuse work without loss of pay." (Pet. Br. at 20).

Petitioner's argument is hinged on a misconception. Though the regulation does immunize an employee who exercises the right to refuse work from

invidious discrimination, the regulation does not require an employer to pay for those periods of time when the employee is not performing assigned work. The petitioner has not cited a single case which construed the regulation to require such payments. The courts which have held the regulation invalid have done so on the belief that Congress had been opposed to providing employees with a right to refuse work with or without pay. Usery v. Whirlpool Corp., 416 F. Supp. 30 (N.D. Ohio 1976); rev'd, 593 F.2d 715 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3188(October 2, 1979); Marshall v. Daniel Construction Co., 563 F.2d 707 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978).

It cannot be denied that the Occupational Safety and Health Act, 29 U.S.C. §651 et seq., does represent a "monumental change in prevailing labor policy." As Senator Javits said, "[t]he bill reported herewith is the most important piece of legislation affecting American workers to be considered by

in many years." Legis. Hist. at 193. For the first time, health and safety standards were to be developed and enforced on a national basis; and for the first time, American workers were given statutory protection to enable them to have a dynamic role in securing "safe and healthful working conditions." 29 U.S.C. §651(b). The Secretary's regulation reflects the change in prevailing labor policy which the Congress enacted; the regulation does not create any change in labor policy.

Prior to the passage of the Act, §7 of the National Labor Relations Act, 29 U.S.C. §157, already provided covered employees with the right to strike over health and safety issues, NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962), if the employees were involved in "concerted activity." Under §7, a single employee acting alone in his own behalf is not protected from employer retaliation, NLRB v. C. & I. Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973); NLRB v. Northern Metal Co., 440 F.2d 881

(3d Cir. 1971); though the NLRB has held that if the health and safety issue affects other employees, the actions of a single employee may rise to the level of "concerted activity." Alleluia Cushion Co., Inc., 221 N.L.R.B. 999 (1975); Interborough Contractors, Inc., 157 N.L.R.B. 1295 (1966), enforced, 388 F.2d 495 (2nd Cir. 1967). Employees covered by labor-management contracts with no-strike clauses are held to have waived their §7 right to strike over health and safety conditions except where there are "abnormally dangerous conditions of work," §502, LMRA, 29 U.S.C. §143. See Gateway Coal Co. v. UMW, 414 U.S. 368 (1974); Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974).

The Occupational Safety and Health Act protects approximately 60,000,000 workers, whereas the National Labor Relations Act protects about

40,000,000 workers. 12/ Thus the Act,

12. 124 Cong. Rec. S8419 (Exhibit 2) (daily ed. May 26, 1978). The difference between the numbers of workers covered by OSHA and the NLRB is due to the less restrictive definition of the term "employee" in the Occupational Safety and Health Act. Under §3(6), 29 U.S.C. §652(6), an employee is defined as follows:

> The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

Whereas, under §2(3) of NLRA, 29 U.S.C. §152(3), the term "employee" explicitly excludes several categories of workers:

> The term "employee" shall include any employee...but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

and the regulation being challenged here, provide rights to some 20,000,000 persons who have none of the protections afforded by the NLRA. See Dunlop v. Trumbull Asphalt Co., 4 OSHC 1847 (BNA, E.D. Mo. 1976); Marshall v. P & Z Co., 6 OSHC 1587 (BNA, D.D.C. 1978). If the regulation is held to be invalid, these 20,000,000 will be without any alternate source of protection from employer retaliation in imminent danger situations. The Act and regulation also provide rights to the 40,000,000 workers covered by the NLRA, since the regulation does not condition its protection on "concerted activity." The Act and regulation, therefore, extend and broaden employee rights under imminently dangerous conditions.

The regulation, in contrast to §7, does not give an employee the right to strike; it merely allows him to refuse to work under imminently dangerous conditions. The employee must make himself available for another work assignment,

and he may not attempt to prevent the employer from carrying on the operation with other employees.

Thus, the Secretary's regulation reflects Congressional intent to change national labor policy. If this regulation were to be invalidated, it would seriously undermine that intent.

CONCLUSION

For the foregoing reasons, the Philadelphia Area Project on Occupational Safety and Health requests this Court to affirm the decision of the Court of Appeals which held that the Secretary had not exceeded his statutory authority in promulgating regulation 29 C.F.R. §1977.12(b)(2).

Respectfully submitted,

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